IN THE HIGH COURT OF DELHI AT NEW DELHI

RSA No.62/2005

Ms.Urmila ..... Appellant
! through: Mr.Sanjay Jain, Sr. Adv. with
Ms.Urvashi Popli, Adv.

VERSUS

$ Sh.Chander Mohan Sharma ..... Respondents
^ through: Mr.S.K.Chaudhary, Adv.

% RESERVED ON : 20.11.2007

DATE OF DECISION: 29-11-2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J.

1. Under-noted 2 substantial questions of law were framed :-

> "A. In view of Ex.PW-3/3 received by the respondent on 27.11.1999 whether the suit for ejectment was pre-mature?
>
> B. Whether on the evidence on record view taken by the learned Trial Judge was plausible and hence the first Appellate Court was wrong in accepting the contrary view?"

2. Appellant was the plaintiff. Respondent was the defendant. I shall be referring to the parties as plaintiff and

defendant.

3. Alleging that plaintiff was owner of property bearing Municipal No.A-1/147-148, New Kondli, Delhi-110096 by virtue of documents registered on 27.10.1995 plaintiff stated that defendant was inducted as a tenant with respect to the show room on the ground floor of the composite property. That letting was for a commercial purpose at a monthly rent of Rs.4500/-. That rent up to May 1999 was paid and with effect from 1.6.1999 defendant was in arrears of rent. That rent for the months of April and May 1999 was paid vide cheque No.320660 and 320666 drawn on Corporation Bank, Vasundhara Enclave. That tenancy was determined vide notice dated 22.11.1999 sent to the defendant on 24.11.1999. That notice was received by the defendant on 27.11.1999.

4. The suit in question was instituted on 16.12.1999.

5. Before noting the defence a fact may be noted. Date when tenancy commenced has not been stated in the plaint.

6. In the written statement filed it was stated that the plaintiff was not the owner of the property, but relationship of landlord and tenant was admitted. It was stated that the agreed rent was Rs.1500/- per month + Rs.100/- towards electricity charges. It was stated that since rent was less than Rs.3500/- per month the civil court had no jurisdiction to

entertain the plaint which sought ejectment of the tenant. Purpose of letting was admitted.

7. Pertaining to the 2 cheques referred to in the plaint as tender of rent for the month of April and May 1999 it was pleaded that not only said 2 cheques but even cheque No.320667 was issued in the name of the husband of the plaintiff in respect of a business transaction. It was stated that the husband of the plaintiff is a property dealer and a builder and had advanced money to the defendant for supply and affixing aluminium glazing and glass etc. for the reason defendant was carrying on said business from the tenanted premises. The defendant did not execute the works and returned the advance by tendering the 3 cheques. That cheque No.320667 was returned by husband of the plaintiff and in lieu thereof Rs.4500/- was received by him in cash. The other two cheques were encashed by the husband of the plaintiff.

8. Pertaining to the written statement it may be noted that even the defendant did not disclose the date with effect where from tenancy commenced.

9. On the pleadings of the parties 5 issues were framed as under :-

> "1. Whether the suit property was let out to the defendant @ Rs.1,500/- per month + Rs.100/- as

electricity charges. If so whether the suit is barred by section 50 of the Delhi Rent Control Act? (OPD)

2. Whether the suit premises is let out to the defendant @ Rs.4500/- if so, whether the plaintiff is entitled for seeking possession of the suit property as per provision of Transfer of Property Act? (OPP)

3. Whether the plaintiff is entitled to mesne profits and damages, if so, at what rate? (OPP)

4. Whether the plaintiff is entitled for the interest as claimed in the plaint, if so, at what rate? (OPP)

5. Relief."

10. Besides self plaintiff examined 2 witnesses.

11. PW-1 Ch. Ravinder Singh stated that he knew the plaintiff for the last 4-5 years. That he knew the defendant who was a tenant under the plaintiff. That monthly rent payable by the defendant to the plaintiff was Rs.4500/- excluding electricity charges. That he asked defendant to pay rent to the plaintiff for the month of January and February 1999 @ Rs.4500/- per month. That even he was a tenant in a shop in property No.A-3/214, Kondli. That he was paying rent @ Rs.6000/- per month. That rent agreement dated 4.11.1999 evidencing rent payable by him to the landlord was Ex.PW1/A. In cross-examination he admitted that rent agreement Ex.PW1/A was not registered. That it was on a stamp paper of Rs.2/-. That he did not remember the date in the month of January and February 1999 when he witnessed defendant pay rent to the plaintiff. He stated that he did not remember as to when was the property

let out.

12. PW-2 Satish Kumar proved rent agreement Ex.PW2/1 pertaining to property No.A-1/145, Main Road, New Kondli. The said rent agreement is dated 7.6.1999. Rent payable as recorded therein is Rs.4500/- per month. In cross-examination he stated that the area of shop let out as per Ex.PW2/1 is 32 sq. yds. He stated that he never witnessed payment of rent by the defendant to the plaintiff.

13. Plaintiff examined herself as PW-3. She proved her alleged ownership with reference to general power of attornies executed by the respective owner of property bearing Municipal No.A-1/147 and A-1/148, New Kondli being Ex.PW3/1 and EX.PW3/2.

14. She stated that she rented out the entire ground floor of both portions to the defendant at a monthly rent of Rs.4500/- for a commercial purpose. That defendant paid rent till the month of May, 1999 through cheques in the name of her husband but thereafter refused to pay the rent. That she terminated the tenancy and received in response reply Ex.PW3/3 from the counsel of the defendant. She proved the site plan of the tenanted premises as Ex.PW3/4. In cross-examination she admitted having executed no writing in favour of her husband to deal with the suit property but stated that

being her husband she had allowed him to look after the building. She admitted that no written lease agreement was executed. She stated that she did not remember whether shop was let out in the year 1996. She admitted that no rent receipt was ever issued. She volunteered that her husband used to collect the rent from the defendant and did not remember whether her husband issued any rent receipt. She admitted that no separate meter was installed for the tenanted premises. She denied that the agreed rent was Rs.1500/- per month.

15. Defendant examined, besides self 4 witnesses. DW-1 Sh. Sudhir Dubey stated that he was a property dealer and that the colony New Kondli was not fully developed in the year 1996. That in the middle of 1996 defendant took the shop i.e. the said property on rent which ad-measured 52 sq. meters. That the agreed rent was Rs.1500/- per month. That on 2 occasions, once in the year 1998 and the other in 1999 he had witnessed defendant pay rent in sum of Rs.1500/- + Rs.100/- towards electricity charges to the plaintiff.

16. From the record of the learned Trial Judge it appears that DW-1 was never tendered for cross-examination.

17. DW-2 Harish Kumar produced the proved Ex. DW2/1 being the bank statement of account pertaining to the current account No.45 in the name of M/s. Rim Zim Glass & Aluminum

Co. the stated sole proprietary firm of the defendant.

18. DW-3/A Narinder Kumar deposed that on the second Sunday of June 1996 he had accompanied the defendant as per request of the defendant when he took on rent the suit premises. That the agreed rent was Rs.1500/- per month + Rs.100/- as electricity charges. In cross-examination he admitted that no other person was present when terms of tenancy were finalized and that no written document was executed.

19. DW-4 Shiv Kumar Dhawan proved statement of account Ex. DW4/1 in the name of the plaintiff maintained with Punjab National Bank Ghaziabad.

20. Defendant examined himself as DW-3. He stated that he took the suit property on rent in the middle of 1996 and that the agreed rent was Rs.1500/- per month + Rs.100/- towards electricity charges. He stated that he issued cheques bearing Nos.320660 and 320666 as also cheque No.320667 in the name of the husband of the plaintiff who had paid him an advance for supply and execution of work pertaining to aluminum glazing and glass work. That the first 2 cheques were encashed but the third cheque bearing No.320667 was returned by the husband of the plaintiff and in lieu thereof he took Rs.4500/- in cash. He proved Ex.DW-3/12, Ex.DW-3/13

and Ex.DW-3/14 being the photocopies of the cash book and the ledger account pertaining to Rim Zim Glass & Aluminimum Co. the sole proprietary firm of defendant. He produced the original of the 3 exhibits for perusal of the court.

21. In cross-examination he stated that he took the shop on rent on the second Sunday of June, 1996.

22. In view of the evidence led, whereas plaintiff urged before the learned Trial Judge that the defendant having admitted issuing cheque Nos.320660 and 320666 drawn on Corporation Bank in the name of her husband and defendant having failed to establish the defence that the cheques were issued for return of the alleged advance paid by her husband, the 2 cheques evidenced the monthly rent. Plaintiff further urged that in view of defendant's reply to the legal notice sent by her determining the tenancy, reply being Ex.PW3/3, the tenancy stood determined and there was no reason why the suit be not decreed. It was highlighted that Ex.DW-3/12, Ex.DW-3/13 and Ex.DW-3/1 being the ledger account and cash book were fabricated documents evidenced from the hand writing which evidenced that one person had written the said documents probably on a single day.

23. Per contra, defendant urged that the tenancy was no doubt determined but pleaded that the suit which was filed on

16.12.1999 was pre-mature. Pertaining to the rent payable it was urged that the 2 cheques issued in the name of the husband of the plaintiff could never be treated as proof of rent for the reason testimony of DW-4 established that the plaintiff was maintaining a bank account in her name and there was no reason why cheque towards rent would be paid in the name of the husband of the plaintiff. It was submitted that Ex.DW-3/12 to Ex.DW-3/14 were truthful documents.

24. Learned Trial Judge held that under Indian circumstances, housewives allow their husbands to look after their commercial interests and therefore the 2 cheques drawn from the account of the sole proprietary firm of the defendant in the name of the husband of the plaintiff were good evidence to establish the monthly rent. Holding that the tenancy was validly determined, learned Trial Judge decreed the suit for ejectment but restricted mesne profits to the stated monthly rent i.e. Rs.4500/- per month.

25. Defendant filed an appeal. He succeeded. The Appellate Court held that the 2 cheques i.e. cheque No.320660 and 320666 paid in the name of the husband of the plaintiff did not establish rent paid by the defendant to the plaintiff. The notice determining the tenancy being the notice dated 22.11.1998 was held to be illegal in as much as Section 106 of the Transfer

of Property Act required 15 days clear notice for termination of the tenancy before filing suit which had to be filed after tenancy month was over.

26. As noted here-in-above the notice determining the tenancy was posted on 24.11.1999 and was received by the tenant on 27.11.1999. It was not in dispute between the parties that the tenancy commenced from the first day of each calender month and expired on the last day of each calender month. Thus, the tenancy could have been determined as per the notice with effect from the midnight of 31.12.1999.

27. Pertaining to the issue of determination of tenancy and relatable to the first substantial question of law framed, learned counsel for the appellant urged that a notice under Section 106 of the Transfer of Property Act has not to be interpreted pedantically or hyper-technically. Counsel stated that the notice has to be liberally construed.

28. Counsel relied upon the following authorities:-

(a) 100 (2002) DLT 497 (DB) *Uttam Parkash Bansal Vs. LIC*

(b) 89 (2001) DLT 440 (DB) *Mercury Travels India Ltd. Vs. Mahabir Prasad & Anr.*

(c) 1999 (51) DRJ (DB) *Capital Boot House & Ors. Vs. Intercraft Ltd.*

29. In my opinion aforesaid judgments have no role to play

while considering the dispute which has emerged for the reason issue does not relate to the validity of the legal notice but relates to the date when cause of action springs pursuant to the notice in question.

30. Suffice would it be to state that requirement of law is to determine a residential or a commercial tenancy by serving a notice intimating the lessee that the tenancy stands determined. The notice of determination has to be served at least 15 days prior to the end of the tenancy month. Meaning thereby the suit has to be filed after the tenancy month is over. Shri Sanjay Jain, learned Senior counsel for the appellant had conceded during arguments that the suit ought to have been instituted on or after 1.1.2000.

31. But, that would not be the end of the discussion. Something more has to be probed.

32. What happens in law where a suit is filed before right to sue has matured but during pendency of the suit the right to sue stands matured?

33. In the decision reported as AIR 2005 SC 1891 *Vithalbhai P. Ltd. Vs. UOI*, the Hon'ble Supreme Court held that a suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became entitled to sue and claim the relief founded on such cause of action is not to be

unnecessarily dismissed for said reason if cause of action matures during pendency of the suit.

34. The reason for the said statement of law is that a suit being pre-mature does not go the root of the jurisdiction of the court. Thus, unless manifest injustice or prejudice is shown caused to the defendant, a court would not deny relief merely because when filed the suit was pre-mature.

35. The High Court of Karnataka, in the decision reported as AIR 2007 Karnataka 162 *Cordcell Pvt. Ltd. Vs. Marazaria Products Pvt. Ltd.*, noting decision of the Supreme Court in *Vithalbhai's* case (supra) held :-

> "No doubt the cause of action arises on the termination of the tenancy. In case suit is filed before expiry of lease period and the said lease periods expires before the defendant files his written statement, no prejudice is likely to cause to the lessee and the suit cannot be dismissed only on the ground that, the suit is filed before the expiry of the lease period. Plaintiff is required to disclose the cause of action in the suit. However, suit need not be dismissed as premature, if by the time the written statement came to be filed, the parties will know their case and adduce evidence and the court will adjudicate the suit on merits on the issues arising out of pleadings."

36. In the instant case, as noted above, suit was instituted on 16.12.1999. Defendant was served for 10.1.2000. Written statement was filed on 9.3.2000. By the time defendant was served and written statement was filed, the date by which plaintiff was entitled to sue after determining the lease had

been crossed.

37. The first question of law framed in the instant appeal is accordingly answered by holding that the suit for ejectment was pre-mature when filed but the same does not entitle the defendant to have the suit dismissed. The suit became maintainable on 1.1.2000, much before the date when the defendant was served and filed the written statement.

38. Pertaining to the second question of law relevant would it be to state that where on the evidence brought before the court 2 views are possible and the Trial Judge adopts one out of the 2 views the first Appellate Court would not be justified in re-appreciating the evidence and adopt the second view. Further, where only one view is possible and the same has been adopted by the first Appellate Court, in second appeal, the second Appellate Court would not re-appreciate the evidence.

39. Pertaining to rent 2 issues were framed in the suit. Issue No.1 was whether the suit property was let out to the defendant at a monthly rent of Rs.1500/-. Onus thereof was on the defendant. The second issue was whether the suit premises was let out to the defendant at a monthly rent of Rs.4500/-. The onus thereof was on the plaintiff.

40. Prima facie, the manner in which issues have been framed leaves much to be desired for the reason what if both parties

led no evidence? Would the court have decided issue No.1 against the plaintiff and issue No.2 against the defendant? This would have been the natural corollary of neither party leading no evidence. What would have been the final decree under said circumstances? I need not speculate on hypthetical issues for the reason under Section 107 of the Code of Civil Procedure it is permissible for an Appellate Court to frame issues other than those framed at the trial and if evidence has already been led on the subject matter it would be permissible for the Appellate Court to neither record further evidence nor refer the matter for further evidence.

41. In my opinion, in view of the pleadings of the parties the issue which needed to be framed was :- At what rate of rent was the suit property let out by the plaintiff to the defendant? Onus on the parties."

42. The issue of rent assumes significance for the reason under the Delhi Rent Control Act, 1958 all properties on rent up to Rs.3500/- p.m. are protected tenancies and civil courts have no jurisdiction to entertain an eviction suit pertaining to the tenanted premises.

43. Before I discuss the evidence brought on record I feel it important to pen down implications of tax avoidance. Tax avoidance is a norm adopted by the vast majority of the

citizens of this country. Tax compliance is the exception. To avoid paying taxes, citizens in this country conduct civil transactions in un-officious manner with the result that evidence recognized as cogent, clinching and good evidence by law is seldom brought on record. Instant case is a classic example thereof. Both parties have heavily relied upon oral testimony.

44. Who would win the battle would ultimately probably be decided on the basis of not who has brought better evidence on record but whose evidence is the worst.

45. Turning to the plaintiff, it has to be noted that she never even disclosed the date on which the tenancy commenced. She brought on record neither the rent note nor a rent receipt and not even proof of any payment tendered in her name. The only evidence brought on record was her self serving testimony and the testimony of PW-1. That apart plaintiff had to clutch on to the 2 cheques being cheque Nos.320660 and 320666 admittedly issued by the defendant in the name of her husband.

46. PW-2 was not a witness when the plaintiff and the defendant settled the terms of lease. He claimed to have always witnessed payment of rent by the defendant to the plaintiff but failed to even remotely give the day, much less the

time when he witnessed payment of the rent. Testimony of PW-2 lacks credibility.

47. The testimony of the plaintiff also lacks credibility for the reason she categorically deposed as under :-

> "I do not operate any bank account. No cheque was issued to me by the deft. of the rent, the cheques of rent which were issued were only issued to the name of my husband. I do not know the date of issue of cheque. In respect of which month. I can not tell the no. of cheques as was not issued to me. My husband deals in property. It is wrong to suggest that the cheques which were issued to my husband by the deft. in respect of business transaction."

48. Her statement is not truthful for the reason, Ex. DW4/1 being the statement of account of the plaintiff evidences that she was maintaining saving bank account No.20 with Punjab National Bank Branch, Ghaziabad and that the account was opened by her on 18.5.1998.

49. Thus, explanation of the plaintiff that cheque Nos. 320660 and 320666 in sum of Rs.4500/- towards rent payable for the months of April and May 1999 were drawn in favour of her husband as she was not maintaining any bank account is palpably false. Her oral testimony is belied by her deeds reflected in Ex.DW4/1.

50. Pertaining to the documentary evidence being Ex.PW1/A and Ex.PW2/1 i.e. the rent agreement dated 4.11.1999 and 7.6.1999 pertaining to property No.A-3/214, New Kondli,

Property No.A-1/145, New Kondli relevant would it be to note and record that the same pertained to tenancies commencing in the month of June and November 1999. For purpose of comparison and determining comparable rents the said rent agreement would have no relevance to tenancies which commenced in the area around the year 1996. Thus, pertaining to said documents the question when the instant tenancy commenced assumes significance.

51. The plaintiff did not disclose in the plaint the month or the year of tenancy. Nor did the defendant did so. However, whereas suggestions were put to the plaintiff in cross-examination that the tenancy commenced in June 1996, plaintiff did not challenge the testimony of the defendant and his witness DW-3/A when both stated that the shop in question was let out on the second Sunday of June 1996.

52. Since DW-1, Sudhir Dubey has not been cross-examined probably for the reason he never offered himself for cross-examination, I eschew the affidavit by way of evidence filed by him.

53. DW-3/A, Narinder Kumar Kaushik and the defendant have clearly stated in cross-examination that the area in question did not have many shops in 1996. Thus, there is evidence that there was not much demand for commercial properties in the

area in the year 1996.

54. Though not very cogent but defendant has brought on record at least some evidence which shows that the rentals in the area in the year 1996 were much less than the rentals in the area in the year 1999.

55. I am conscious of the fact that the shop which is subject matter of the dispute has an area larger than the area of the shops which are subject matter of Ex.PW1/A and Ex.PW2/1.

56. In the year 1996 and till the year 2002 for rented properties property tax was being assessed and collected in relation to actual rents. Plaintiff has not brought on record any evidence that she paid property taxes qua the property owned by her disclosing that the ground floor was on rent of Rs.4,500/- per month. She has with held best evidence. Further, her husband who was the best witness to depose regarding receipt of two cheques in his name from the defendant has not been examined by the plaintiff as her witness. The version of the plaintiff that the two cheques were drawn in the name of her husband as she was not maintaining any bank account stands belied from the fact that since 1998 she was maintaining a bank account. It has to be noted that the two cheques were issued in the month of May 1999.

57. As per Evidence Act a fact is said to be proved when, after

considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that exists. As per Evidence Act a fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said not to be proved when it is neither proved nor disproved.

58. Even if I were to lean backwards in favour of the plaintiff it would be a case where neither party has proved or disproved whether rent was Rs.1500/- per month or it was Rs.4500/- per month. It would then be a case of rent being not proved i.e. neither proved nor disproved by either party.

59. The plaintiff must therefore lose the battle.

60. The appeal is dismissed.

61. No costs.

29 November, 2007
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PRADEEP NANDRAJOG
(JUDGE)